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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. [redacted]

STATE OF WISCONSIN, *Petitioner*,

v.

JONAS YODER, *Respondent*.

STATE OF WISCONSIN, *Petitioner*,

v.

ADIN YUTZY, *Respondent*.

STATE OF WISCONSIN, *Petitioner*,

v.

WALLACE MILLER, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

ROBERT W. WARREN
Attorney General
JOHN W. CALHOUN
Assistant Attorney General

Department of Justice
State Capitol - Room 114 East
Madison, Wisconsin 53702

March 30, 1971

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WALLACE MILLER, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

The petitioner State of Wisconsin respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Wisconsin made in this proceeding on January 8, 1971.

OPINION BELOW

The opinion of the Supreme Court of the State of Wisconsin appears in 49 Wis. 2d 430, 182 N.W. (2d) 539 (1970) and in the Appendix hereto.

JURISDICTION

The judgment of the Supreme Court of the State of Wisconsin was made on January 8, 1971, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257 (3) in that the validity of a state statute is drawn into question as being repugnant to the free exercise of religion as guaranteed by the First Amendment of the United States Constitution.

QUESTIONS ON PETITION FOR CERTIORARI - AMISH CASE

(1) Is Wisconsin's compulsory school attendance law, in particular secs. 118.15 (1) (a) and 118.15 (5), Wis. Stats., 1969, constitutional despite respondents claim that attendance of their children in any school beyond eighth grade would be a violation of respondents' right to worship freely as guaranteed to them by the First Amendment to the United States Constitution?

(2) Does the ruling of the majority opinion of the Wisconsin Supreme Court in *State v. Yoder, et al.*, 49 Wis. 2d 430, 182 N. W. (2d) 539 (1970), making an exemption for the respondents and other members of their religious sect from the Wisconsin compulsory attendance law violate the prohibition against the establishment of religion as contained in the First Amendment in the United States Constitution?

(3) Whether the exemption is mandatory and required to be made or whether an exemption granted respondents is properly within the prerogative of the state legislature to grant or withhold as it pleases?

(4) Whether the Wisconsin Supreme Court correctly applied *Sherbert v. Verner,* 374 U. S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965, (1963), or whether it should have applied *Prince v. Commonwealth of Massachusetts,* 321 U. S. 158, 64 S. Ct. 438, 88 L. Ed. 645, (1943)?

(5) Does a minor child have a constitutionally protected right to an education superior to the claim of respondent parents that education of their children beyond eighth grade violates respondents' constitutional right to worship freely?

STATUTORY PROVISIONS INVOLVED

The statutes involved in this petition are:

Section 118.15 (1) (a), Wisconsin Statutes, 1969.

"Unless the child has a legal excuse or has graduated from high school, any person having under his control a child who is between the ages of 7 and 16 years shall cause such child to attend school regularly during the full period and hours, religious holidays excepted, that the public or private school in which such child should be enrolled is in session until the end of the school term, quarter or semester of the school year in which he becomes 16 years of age."

Section 118.15 (5), Wisconsin Statutes, 1969.

"Whoever violates this section or files a false statement under s. 118.16 (1) may be fined not less than $5 nor more than $50 or imprisoned not more than 3 months or both. In a prosecution under this subsection, if the defendant proves that he is unable to comply with the law because of the disobedience of the child in question, the action shall be dismissed and the child shall be proceeded against as delinquent under ch. 48."

United States Const. art. I.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

At least two of the respondents in this case are members of the Old Order Amish religious sect. Apparently a third, while Amish, is not a member of the Old Order. The respondents were each accused of violation of sec. 118.15 (1), Wis. Stats., 1969, hereafter referred to as the compulsory attendance law. Pursuant to agreement, the cases were tried together by the County Court of Green County, Wisconsin, on April 2, 1969.

The trial court after the conclusion of the trial and oral arguments, found that at the times and places charged in the complaint the Amish children of the respondents were between the ages of 7 and 16 years; they were not attending a high school, vocational school, technical school, or a private school of any kind. Each of the respondents was a parent of one of the children and each concurred in his child's nonattendance and made the decision that such child should not attend school. The trial court concluded and found that the respondents were guilty and filed an extensive memorandum opinion supporting this position.

On appeal to the Circuit Court of Green County, respondents were granted trial *de novo* and that court likewise found the respondents guilty and filed a memorandum decision in support of the finding.

HOW FEDERAL QUESTION IS PRESENTED

Prior to trial respondents raised by motion in the trial courts the question of whether the Wisconsin compulsory education laws violated the freedom to worship clause of the First Amendment of the United States Constitution. See App. II.

The county and circuit courts of Green County, Wisconsin, considered the issues and after the trial, denied respondents' motions involving the constitutionality of the statute. See App. II.

All respondents appealed to the Wisconsin Supreme Court and on January 8, 1971, the judgment of that court reversed the judgments of the lower court. See App. I.

There are seven members of the Wisconsin Supreme Court. One Justice wrote the "principal" opinion containing the rationale for reversal; however, five other Justices joined in a concurring opinion modifying the conclusion of the principal opinion and one Justice dissented.

AMISH BACKGROUND

A considerable amount of the trial was taken up with the testimony of two expert witnesses for the respondents. One of these witnesses, John A. Hostetler, is the author of a definitive work the Amish Society, John A. Hostetler, Revised Edition, John Hopkins Press (1968).

At least a cursory understanding of the complex nature of the Amish society and their ways is necessary to an understanding of the importance of this case. The following quotations are from the above work and the references are to the page numbers of the work:

> "The outside observer cannot help but be aware of the distinctiveness of the Amish people. All he needs to do is drive through any Amish community and observe the Amish team of horses, the carriages driving on the highway, the farm homesteads, and the dress of the people. On visiting a farm he will observe distinctions in farm implements, furniture, and books. All Old Order Amish communities are distinctive in maintaining a doctrine and practice of nonconformity to the world. These major points of the charter forbid the Amishman to engage in war, in

politics, or in a business with an outsider for a partner. This belief also finds expression in the restrictions against electricity and telephones. Distinctiveness is apparent to the insider by a recognized way of life and by the many symbols of group identity: styles of clothing and grooming, a distinct language, a common occupation, intimate knowledge of other members of the community, and religious ceremony and common sentiment. pp. 9-10.

"The basic social unit of the Amish community is small. This primary, self-governing unit, wherever Amish live, is the 'church district.' The rules of life are determined by this local bandlike organization, which is kept small by the ceremonial functions of assembling in a single household and by the limitation imposed by horse-and-carriage travel. * * * This small unit, from thirty to forty households, is the congregation. Households take turns having biweekly religious services in their homes * * *. The district is the evaluating and decision-making social unit. * * * Each district has its own ordained officials and there is almost no other formal organization. * * * pp. 12-13.

"The sanctions against those who deviate from the *Ordnung* are among the most effective means of control. The social controls are primary and are initiated by the local district. Punishment or the threat of punishment is a strong incentive for conforming to the norms. Transgressors are subject to the counsel of the entire little-church community. To be expelled or to be received back into full fellowship requires a unanimous vote. Minor offenses may be punished by making a confession to the church, provided the transgressor is not stubborn about making the confession when he is admonished. Major offenses are punishable by excommunication, which requires avoidance—the latter is called shunning, or the ban." p. 14.

REASONS FOR GRANTING THE WRIT

A. This Case Is In Direct Conflict With United States Supreme Court Cases And Numerous State Jurisdictions Dealing With The Subject.

The judgment in the case at bar is contrary to *Prince v. Commonwealth of Massachusetts,* 321 U. S. 158, 166, 168, 64 S. Ct. 438, 88 L. Ed. 645, (1943). In that case the Court stated:

> "But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. *Reynolds v. United States,* 98 U. S. 145, 25 L. Ed. 244; *Davis v. Beason,* 133 U. S. 333, 33 L. Ed. 637, 10 S. Ct. 299. And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control *by requiring school attendance,* regulating or prohibiting the child's labor, and in many other ways. (Emphasis added).
>
> "* * *
>
> "The state's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities and in matters of employment. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies."

In Galanter Religious Freedoms, 1966 Wisconsin Law Review, 217, at page 299, is the following summary of the law with respect to compulsory school attendance *vis a vis* religious freedom:

> "A parent does not have a right to withhold his child from all secular schooling or from secular schooling that he thinks is religiously detrimental. But he does have a right to send him to a religious school which meets the requirements of the state's education laws. Religious societies have a right to operate such schools. Parents may not inculcate religion by practices which violate school attendance laws—even to observe their Sabbath or religious holidays—or child labor laws."

In addition to the legal recognition of the common legislative authority and intent of the child labor and compulsory attendance law, the common relationship is well documented historically in The Transformation of the School, Lawrence A. Cremin, Alfred A. Knopf, New York (1961), page 127:

> "Massachusetts passed the first state-wide compulsory-attendance law in 1852; Mississippi was the last of the states to pass one, in 1918. During the interim educational reformers learned some painful facts of political life. They discovered, among other things, that passing a law does not necessarily get children to school; that in the absence of proper statistical records there is no way of knowing in the first place whether or not children are attending; that without effective enforcement procedures the very children the law is designed to coerce escape its beneficent influence; and that without correlative measures regulating child labor and employment a compulsory attendance law is a sham, unenforceable and ultimately meaningless."

It is also well documented in State Law on Compulsory Attendance, Steinhilber & Sokolowski, H. E. W., Office of Education, page 3-4:

> "Child labor and school census laws are closely allied to compulsory school attendance laws.

"* * *

"Enforcement of the compulsory school attendance laws with stricter youth employment statutes, more effective accounting procedures, and school census laws have led to dramatic growths in school enrollment. * * *"

The principle of *Prince v. Commonwealth of Massachusetts, supra,* has recently been reaffirmed in *Ginsberg v. State of New York,* 390 U. S. 629, 20 L. Ed. 2d 195, 88A S. Ct. 1274, (rehearing denied) 391 U. S. 971, 88 S. Ct. 2029 (1968).

In addition, the importance of education for the child and the compelling interest of a democratic society in education has been the subject of numerous other cases, for example, *Meyer v. State of Nebraska,* 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923), *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary,* 268 U. S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925), *West Virginia State Bd. of Education v. Barnette,* 319 U. S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943), *Abington School District v. Schempp,* 374 U. S. 203, 83 S. Ct. 1560 10 L. Ed. 2d 844, (1963).

In addition to this the jurisdictions of several states have been unanimous in their holding that the compulsory attendance laws constitute a valid exercise of the police power of the state and the doctrine of *parens patriae* to protect the best interests of society by securing to children the opportunity to acquire an education. These cases are *State v. Garber,* 197 Kan. 567, 419 P. 2d 896 (1966), Cert. Denied 389 U. S. 51, 88 S. Ct. 236, 19 L. Ed. 2d. 50, *State v. Hershberger,* 103 Ohio App. 188, 144 N. E. 2d 693 (1955), *Commonwealth v. Smoker,* 177 Pa. Super 435, 110 A. 2d 740 (1955), *People v. Turner,* 263 P. 2d 685 (1953) (appeal dismissed), 347 U. S. 972, 98 L. Ed. 1112 (1953), *Commonwealth v. Beiler,* 168 Pa. Super 462, 79 A. 2d 134 (1951), *Commonwealth v. Bey,* 166 Pa. Super 136, 70 A. 2d 693 (1950), *Rice v.*

Commonwealth, 188 Va. 224, 49 S. E. 2d 342 (1948), *Marsh v. Earle,* 24 F. Supp. 385, 14 A. 2d 368 (1938), *Stephens v. Bongart,* 15 N. J. M. 80, 189 A. 131 (1937), *State v. Williams,* 56 S. D. 370, 228 N. W. 470 (1929), *Parr v. State,* 117 Ohio 23, 157 N. E. 555 (1927), *DeLease v. Noland,* 185 App. Div. 82, 172 N. Y. S., 552 (1918), *State ex rel. O'Bannon v. Cole,* 220 Mo. 697, 119 S. W. 424 (1909), *State v. Jackson,* 71 N. H. 552, 53 A. 1021 (1902), and *State v. Bailey,* 157 Ind. 324, 61 N. E. 730 (1901).

All of these cases have upheld the validity of compulsory attendance laws. We have been unable to find any case to support the holding of the Wisconsin Supreme Court that the compulsory attendance laws of the State of Wisconsin are unconstitutional as applied to the Old Order Amish.

B. Importance Of The Wisconsin Decision

Forty-eight states have compulsory education laws. In 1964, there were 13,470,000 children with the age group affected by these compulsory attendance laws. There are at least 20 states in which members of the Amish faith live. A recent study by the Wisconsin Legislative Council (See Wisconsin Legislative Council Staff Report to the Education Committee on the Amish Community in Wisconsin and Selected Other States, February, 1968, p. 13) discloses that "[O]f a total of 250 churches, Ohio has 74, Indiana 57 and Pennsylvania 54." The report goes on to state:

> "The 1967 *Mennonite Yearbook* lists 5 in Wisconsin. Since the Amish keep few church records of their own and unwillingly respond to religious censuses by outsiders, their population can only be estimated. *The Mennonite Yearbook* annually carries all the available Amish membership data with a list of church districts and their

leaders. Allowing for churches that failed to report in the current issue of the *Yearbook* it has been estimated that there are 19,000 baptized Old Order Amish members. Since baptism is not performed until a person is in his late teens, probably over half of the Amish population are not included in the above figure."

Table 1 of the Report indicates that in the year 1967-68, there were 93 Amish children in public schools in Wisconsin and 163 in private Amish schools. It is not known how many Amish children in Wisconsin are not attending any school of any kind.

The concurring and principal decisions of the Wisconsin Supreme Court take a view regarding the importance of education which is contrary to that expressed as follows in *Brown v. Board of Education of Topeka,* 347 U.S. 483, 493, 74 S. Ct. 686, 98 L. Ed. 873, (1954):

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. * * *"

Of the 48 states that have compulsory attendance laws, some have granted exemption to the Amish. However, all states have presumed the law to have been, up to the time of the Wisconsin decision, constitutionally applicable to all

children regardless of the religious beliefs of their parents. *Prince v. Commonwealth of Massachusetts, supra.* Because of its breadth and uniqueness, the judgment of the Wisconsin Supreme Court, if allowed to stand, will have great impact on the effectiveness of the compulsory education laws of the other 47 states. In the principal decision (*State v. Yoder, et al,* 49 Wis. 2d, 430, 436, 437, 182 N.W. (2d) 539 (1970)) the Court correctly stated but erroneously applied the proposition that the free exercise clause of the First Amendment is not restricted in its protection to formal ritualistic acts of worship common in theistic religions but also includes practice or exercise of religion which is binding in conscience. *Welsch v. United States,* 398 U.S. 333, 90 S. Ct. 1792, 26 L. Ed. 2d 308, (1970). The decision will certainly, if allowed to stand, be used for authority to support attacks on the compulsory education laws by the Amish in other states and by non-Amish throughout Wisconsin and the nation who, because of their conscientious beliefs, would argue that they are entitled to equal protection of the laws. This case is of national importance.

C. The Limits Of *Sherbert v. Verner,* 374 U.S. 398, 10 L. Ed. 2d 965, 83 S. Ct. 1790 (1963), And In Particular The Relationship Of That Case, If Any, To The Compulsory School Attendance Laws Should Be Established.

The concurring and principal opinions of the Wisconsin Supreme Court propound an important, although erroneous, broadening of the decision in *Sherbert v. Verner, supra.*

First, the opinions completely ignore the *parens patriae* doctrine which forms the basis for compulsory education

laws. No effort has been made by the Wisconsin court to equate this basic concept of well ordered liberty to the "compelling interest" requirement of *Sherbert v. Verner, supra.*

> "* * *The doctrine of parens patriae expresses the inherent power and authority of the state to provide protection of the person and property of a person non sui juris. * * *" 67 C.J.S., *Parens Patriae,* 624.

The substantive nature of this doctrine has not been altered or redefined as a result of *Re Gault,* 387 U. S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527, (1967). That decision deals primarily with the procedural aspects of the exercise of the doctrine. In fact, *Re Gault, supra,* bolsters the right of minors in the area of procedural due process. In contrast, the principal and concurring opinions remove the substantive right of children to an education which is secured to them by *parens patriae* and puts that doctrine back in the realm of the ecclesiastical law where it hasn't resided since at least the time of Henry VIII.

Second, the majority opinions produce a piece of judicial legislation which violates the establishment clause of the First Amendment to the United States Constitution. The decision in which five of the Justices agreed, exempts the Amish parents from the requirement that all parents be required to send their children to some school until the children are 16 years old. The exemption granted is as follows:

> "* * * children of members of the Old Order Amish religion, * * * living as members of the Amish Community, should not be required to attend a school which meets the requirements of state law beyond the eighth grade." *State v. Yoder, et al., supra.,* 447.

Given the mandate above, officials of the Wisconsin educational system are required to determine on a frequent

and regular basis the type and kind of membership of the Amish in Wisconsin and whether such Amish are actively living in the community.

Because of among other factors the wide variety of beliefs, conditions of membership, and the Amish theological concept of community as opposed to the natural geographic limitations of a community, the State of Wisconsin would be inexorably drawn into the "impermissible degree of entanglement" objected to in *Walz v. Tax Commission of the City of New York*, 397 U.S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697, (1970).

Further, with respect to the establishment clause it should be pointed out that *Sherbert v. Verner, supra.*, restored appellant's right to worship freely and what is equally important to the consideration of the establishment clause, placed the appellant on a par with Sunday worshipers thereby fulfilling the constitutional requirement of neutrality in the face of religious differences. In the case at bar the principal and concurring opinions erroneously ignore this rationale in applying the *Sherbert* doctrine. Here the Wisconsin Supreme Court has upset the neutral posture of the compulsory attendance law by carving out an exception for the Amish. A definitive statement on the breadth of the application of *Sherbert v. Verner, supra.*, and the limits of the Court in the exercise of the benevolent neutrality doctrine is needed. See Public Aid to Parochial Schools, Paul A. Freund, Vol. 82, Harvard Law Review, 1680 (1969).

D. The Constitutional Exercise Of "Benevolent Neutrality" Is Within The Province Of The Legislature And Not The Courts.

In all states where Amish religious beliefs have been accommodated to the compulsory attendance laws, the result has come by action of the legislative branch of government. The Wisconsin decision is the only one which has judicially legislated an exemption for the Amish.

The Wisconsin Legislature recently considered and rejected an attempt to accommodate the Amish through modification of the compulsory attendance law. In February of 1968, the Wisconsin Legislative Council Staff Report To The Education Committee On Amish Community In Wisconsin, at page 29, concluded:

> "There is a lack of unanimity among the members of the Amish communities in Wisconsin as to their attitudes toward public education which may make it unnecessary and certainly difficult to devise specific proposals exempting them from school policies and requirements."

All of the states granting exemptions to the Amish from compulsory education laws have done so on the basis that it is permissive, not mandatory, to do so; that the compulsory attendance law is constitutional as applied to the Amish and that it is within the province of the legislature to make the exception.

The legislative purpose of the compulsory attendance law is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility. In common with 47 other states, Wisconsin has had, since 1879, a compulsory attendance law. The first compulsory attendance law in this country

was passed in colonial Massachusetts in 1642. In 1852 the Commonwealth of Massachusetts passed the first compulsory attendance law. Much of what is said about the exemption of religious institutions from taxes is applicable to the compulsory attendance laws. *Price v. People of the State of Illinois,* 238 U.S. 446, 35 S. Ct. 392, 59 L. Ed. 1400 (1915), *United States v. Carolene Products Co.,* 323 U.S. 18, 65 S. Ct. 310, 89 L. Ed. 15 (1944), *Wisconsin Protestant Home for the Aged v. City of Milwaukee,* 41 Wis. 2d 284, 164 N.W. (2d) 289 (1968), and *Walz v. Tax Commission of the City of New York,* 397 U.S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970).

Assuredly, exemptions to laws implementing such institutions of our society as taxes and education are within the prerogative of the legislature, not the judiciary to establish. The Walz Decision: More On The Religion Clauses Of The First Amendment, Kauper, Vol. 69, Mich. L. Rev. 179, 198 (December, 1970).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinions of the Supreme Court of the State of Wisconsin. See: *Gillette v. United States,* docket no. 85, and *Negre v. Larsen, etal.,* docket no. 325, both cases decided March 8, 1971, U.S. , S.Ct. , L.Ed. 2d , 39 Law Week 4305.

Respectfully submitted,

ROBERT W. WARREN
Attorney General

JOHN WILLIAM CALHOUN
Assistant Attorney General

Department of Justice
State Capitol - Room 114 East
Madison, Wisconsin 53702

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